SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

03/27/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000136

FILED: _____

STATE OF ARIZONA

MICHAELLA AGUILAR HESLIN

v.

MICHELLE LEE MCLEOD

DAVID BURNELL SMITH

MESA JUSTICE CT-WEST
REMAND DESK CR-CCC

MINUTE ENTRY

WEST MESA JUSTICE COURT

Cit. No. #53323

Charge: A. DUI LIQUOR

DOB: 04/25/68

DOC: 11/05/99

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since oral argument on March 6, 2002. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules

of Practice. This Court has considered and reviewed the record of the proceedings from the West Mesa Justice Court, and the Memoranda submitted by counsel.

Appellant, Michelle Lee McLeod, was charged on November 5, 1999 with the crime of Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1). She entered a plea of Not Guilty and the case proceeded to trial before the Hon. Clayton R. Hamblin, West Mesa Justice of the Peace, on February 2, 2001. Appellant was convicted of the crime and has filed a timely Notice of Appeal.

The first issue raised by Appellant concerns arguments by the prosecuting attorney in her rebuttal closing argument. At issue during the trial had been the performance of Appellant on field sobriety and HGN tests administered by the arresting officer. The prosecutor stated:

> There was no evidence- - there has been no evidence here that the Defendant had any problems with her eyes that night except by her own statements. There's been no testimony, no medical testimony at all, she could have provided that today. It would have been very simple for her to do that, but she didn't.[1]

Defense counsel made a timely objection to this comment, and the trial judge presumably overruled the objection.[2]

Generally, counsel should be accorded wide latitude in their arguments before the court and jury, particularly where the trial court has instructed the jurors that they must based

[1] R.T. of February 2, 2001, at page 206.
[2] The trial judge allowed the prosecutor to continue, but did not orally state his ruling on the objection for the record, counsel or the jury to hear. By allowing the prosecutor to continue, the trial judge has impliedly overruled the objection.

their verdict only on the evidence submitted, and that the arguments of counsel are not evidence. In Arizona, the prosecutor may comment upon the failure of the Defendant to produce material witnesses would substantiate his or her testimony or defense.[3] However, this general rule is limited by the Arizona Supreme Court to situations where the failure to produce a material witness is limited to witnesses who are available "both legally and practically" to only one side (the party who fails to produce the witness).[4] The general rule permitting comment by the prosecutor upon the failure of the Defendant to produce material witnesses who might substantiate his story derives from the well recognized principle that the "non-production of evidence may give rise to the inference that it would have been adverse to the party who could have produced it."[5]

In this case it is clear that the medical evidence or medical doctor that the prosecutor referred to was a witness whose testimony was only available to Appellant because of the physician-patient privilege. Only Appellant could waive that privilege. This Court finds no error by the trial court in allowing the prosecutor to comment on Appellant's failure to substantiate her testimony.

Appellant next claims that the trial judge erred in refusing counsel's request for "mini–opening statements". Both parties correctly cite the applicable Rule of Criminal Procedure to this Court. Rule 18.5(c), Arizona Rules of Criminal Procedure, provides in pertinent part:

> The parties may, with the court's consent, present brief opening statements to the entire

[3] *State v. Condry*, 114 Ariz. 499, 562 P.2d 379 (1977); *State v. Hatten*, 106 Ariz. 239, 474 P.2d 830 (1970).
[4] *State v. Young*, 109 Ariz. 221, 225, 508 P.2d 51, 55 (1973), citing *Samish v. United States*, 223 F.2d 358, 365 (9th Cir. 1955).
[5] *State v. Hatten*, 106 Ariz. 239, 241-42, 474 P.2d 830, 832-33 (1970), citing *People v. Basler*, 217 Cal.App.2d 389, 401, 31 Cal.Rptr. 884, 892 (1963).

> jury panel, prior to voir dire. On its own motion, the court may require to do so.

The critical words in this rule are “with the court’s consent”. That is, mini-opening statements are permissible in the discretion of the court. This Court finds no error by the trial judge in denying counsel’s request as it is clear from the rules that there is no right to make a mini-opening statement. Though, in many cases it may be helpful to counsel and the jurors to make a mini-opening statement, the trial court did not abuse its discretion in denying Appellant’s counsel’s request.

IT IS ORDERED affirming the judgments of guilt and sentence imposed by the trial court in this case.

IT IS FURTHER ORDERED remanding this matter back to the West Mesa Justice Court for all further and future proceedings.